FILED
No. (1) 031611 MAY 27 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

COMMONWEALTH CONSTRUCTION MANAGEMENT, INC. T/A HANDYMAN CONCRETE AND IRA AND VIRGINIA COX, LLP,

Petitioners,

v.

BOARD OF ZONING APPEALS OF FAIRFAX COUNTY, VIRGINIA; BOARD OF SUPERVISORS FOR THE COUNTY OF FAIRFAX, VIRGINIA; COUNTY OF FAIRFAX, VIRGINIA; AND THE ZONING ADMINISTRATOR OF FAIRFAX COUNTY,

Respondents.

On Petition for a Writ of Certiorari to the Circuit Court of Fairfax County, Virginia

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PETITION FOR WRIT OF CERTIORARI

Dexter S. Odin, Esq.
Elizabeth A. Keith, Esq.
Odin, Feldman & Pittleman, P.C.
9302 Lee Highway, Suite 1100
Fairfax, Virginia 22031
(703) 218-2122
Counsel for Petitioner Commonwealth Construction Management, Inc. t/a Handyman Concrete

W. McCauley Arnold, Esq.
John W. Farrell, Esq.
McCandlish & Lillard, P.C.
13350 Random Hills Road
Suite 500
Fairfax, Virginia 22030
(703) 934-1182
Counsel for Petitioner Ira and Virginia Cox, LLP

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED

I. Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, is a section of a county zoning ordinance unconstitutionally vague where that section, as interpreted by the zoning administrator, board of zoning appeals, and circuit court, fails to give a person of ordinary intelligence fair notice of the prohibited uses of such property?

II. Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, is a section of county zoning ordinance unconstitutionally vague where interpretation of that section of the ordinance by the county zoning administrator, board of zoning appeals, and circuit court, leads to standardless and arbitrary enforcement by the county zoning administrator?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Supreme Court Rule 29(6), the Petitioners, by counsel, file the following corporate disclosure statements:

Petitioner Commonwealth Construction Management Inc., t/a Handyman Concrete, avers that there is no parent corporation. Petitioner Commonwealth Construction Management Inc., t/a Handyman Concrete, further avers that it is not a publicly held corporation nor is 10% or more of the stock owned by a publicly held corporation or publicly held entity.

Petitioner Ira and Virginia Cox, Limited Partnership, LLP, is not a corporation, and therefore, no corporate disclosure statement is required as to this Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The Petitioners respectfully pray that a writ of certiorari issue to review the state court judgment below.

OPINIONS BELOW

The Order of the Fairfax County Circuit Court, which is the highest state court to review the merits of this case, appears at Appendix A to the petition and is unpublished. The denial of review by the Virginia Supreme Court appears at Appendix B to the petition and is also unpublished.

JURISDICTION

The Virginia Supreme Court denied the Petition for Writ of Certiorari for this case on February 27, 2004. A copy of that decision appears at Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). 28 U.S.C.A. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV (1868):

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Va. Code Ann. § 15.2-2286 (2003 Repl. Vol.):

A. A zoning ordinance may include, among other things, reasonable regulations and provisions as to any or all of the following matters:

. . . .

5. For the imposition of penalties upon conviction of any violation of the zoning ordinance. Any such violation shall be a misdemeanor punishable by a find of not less than $10 nor more than $1,000. If the violation is uncorrected at the time of the conviction, the court shall order the violator to abate or remedy the violation in compliance with the zoning ordinance, within a time period established by the court. Failure to remove or abate a zoning violation within the specified time period shall constitute a separate misdemeanor offense punishable by a fine of not less than $10 nor more than $1,000, and any such failure during any succeeding ten-day period shall constitute a separate misdemeanor offense for each ten-day period punishable by a fine of not less than $100 nor more than $1,500.

. . . .

Fairfax County Zoning Ordinance, Art. 5, Part 5, I-5 General Industrial District

§ 5-502 Permitted Uses

. . . .

12. Lumber yards and building material yards to include rock, sand and gravel.

. . . .

Fairfax County Zoning Ordinance, Art. 9, Part 5, Category 5 Commercial and Industrial Uses of Special Impact

§ 9-501 Category 5 Special Exception Uses

. . . .

13. Heavy industrial uses, to include:

. . . .

G. Concrete mixing or batching plant.

Fairfax County Zoning Ordinance, Art. 18, Part 9, Violations, Infractions, and Penalties

§ 18-902 Criminal Violations and Penalties

1. Any violation of the provisions of this Ordinance, other than those set forth in Sect. 903 below, shall be deemed a misdemeanor and, upon conviction thereof, shall be punishable by a fine of not less than $10 and not more than $1000. Failure to remove or abate a zoning violation within the time period established by the Court shall constitute a separate misdemeanor offense punishable by a fine of not less than $10 nor more than $1000, and any such failure during any succeeding ten day period punishable by a fine of not less than $100 nor more than $1500.

. . . .

STATEMENT OF THE CASE

Petitioner Ira and Virginia Cox, LLP ("Cox LLP") is the owner of certain real property located at 13800 Barnsfield Road in Fairfax County, Virginia, and identified on County Tax Maps as Parcel 034-2-01-0003-A (the "Property"). This Property is located in an I-5 Zoning District. Petitioner Commonwealth Construction Management, Inc., trading as Handyman Concrete ("Handyman Concrete"), is one of several tenants on the Property at issue.

The previous tenant of that portion of the Property (the "Premises") now operated by Handyman Concrete was an entity known as Handyman Concrete, Inc.[1] Ira Cox ("Mr. Cox"), a partner of Cox LLP, was the chief operating officer of Handyman Concrete, Inc. In 1983, Mr. Cox began the process of obtaining a site plan for the Property. At the time, the Fairfax County Comprehensive Plan provided that Barnsfield Road was to be relocated so that it aligned with Route 28 and also served the future site of the Air and Space Museum annex. However, due to a dispute between the Virginia Department of Transportation ("VDOT"), Fairfax County (the "County"), and the Franklin Farm homeowners, the exact alignment of the relocated Barnsfield Road was not determined. Meanwhile, Mr. Cox's application for a site plan was stymied by the County and its attempts to enforce a provision of its Ordinance, which required an owner to dedicate and build off-site roads shown on its Comprehensive Plan in order to obtain the approval of a site plan, an enactment the Virginia Supreme Court has declared illegal.[2] Mr. Cox had refused to build and

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[1] Handyman Concrete, Inc. is a separate and distinct entity from the Petitioner Handyman Concrete.

[2] This specific section of the County Zoning Ordinance was declared illegal in *Cupp v. Bd. of Supervisors of Fairfax County*, 227 Va. 580, 318 S.E.2d 407 (Va. 1984); *accord Bd. of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (Va. 1975) (holding that a county board of supervisors did not have the authority to enact a

dedicate this road. Thus, no final site plan approval was issued in 1983. The only option offered by the County to Mr. Cox to operate Handyman Concrete, Inc. was to obtain a temporary site plan waiver, which would allow him to operate the business as a building materials yard. Since 1983, Handyman Concrete, Inc. used the Premises as a building materials yard. Every two years from 1983 through 1993, the County issued a Non-residential use permit ("NRUP") authorizing continued use of the Premises as a building materials yard.

In 1995, Mr. Cox filed an application with the County to further extend the temporary site plan waiver, as there still was no decision regarding the relocation of Barnsfield Road. That application was in the hands of the County for more than seven years. During this time, neither Mr. Cox nor Handyman Concrete, Inc. received any notice of zoning violations or any communication at all from a County zoning official.

In December 2000, Mr. David Tracy ("Mr. Tracy") entered into a purchase contract with Mr. Cox to acquire the business of Handyman Concrete, Inc. and subsequently founded Petitioner Handyman Concrete. Mr. Tracy is a principal shareholder and the current President of Handyman Concrete. As part of the due diligence process prior to acquiring the business of Handyman Concrete, Inc. in May of 2001, Mr. Tracy personally met with County zoning officials and agents of the County Zoning Administrator on three separate occasions to make sure the continued use the Premises was permissible. At that time, Mr. Tracy explained in great detail the use that Handyman Concrete intended to make of the Premises and of the existing structures on the Premises. Consistent with the multiple temporary NRUPs that had been issued to Mr. Cox, County zoning officials opined that such uses constituted the storage of building materials, which was a permitted use in an I-5 Zoning District. Indeed, the use that Mr. Tracy disclosed

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zoning ordinance that required landowners to dedicate a portion of their lands for road purposes).

to the zoning officials was in every material respect the same use that had been made of the Premises for nearly two decades by Handyman Concrete, Inc. This use was also consistent with usage of the Premises that the County Zoning Administrator had determined was lawful for the issuance of NRUPs to the previous occupant, thereby authorizing it to conduct the use as a building materials yard.

Following these discussions, Mr. Tracy insisted upon a condition of the purchase contract that Mr. Cox resubmit another application for a site plan waiver in May of 2001. Mr. Tracy and Mr. Cox periodically checked on the status of this site plan waiver over the next year and were told that the Department of Public Works and Environmental Services had received the site plan application, and although they could not provide any reason as to why the application hadn't yet been responded to, they assured them that it was under review. In fact, the County failed to issue any response to Mr. Cox's site plan application until the month following the Zoning Administrator's Notice of Violation dated April 29, 2002.

Based upon the representations by the County zoning administration concerning the permitted and prior usage of the Premises, Mr. Tracy acquired Handyman Concrete, Inc. and committed over $1,000,000.00 toward the new business venture, Handyman Concrete. The new entity, Handyman Concrete, stored building materials on the Premises (which included sand, gravel, and cement) and then loaded those materials onto trucks from silos and conveyors for transporting to various work sites. It is undisputed that none of these materials pass into or through a mixing "plant," as there is no mixing or batching "plant" on the Premises. Rather, the raw materials would be loaded onto trucks, which then removed the materials to various destinations. Once the trucks were en route upon public highways to the appropriate work site, the materials would be mixed into concrete within the trucks themselves.

By letter dated April 29, 2002, the Zoning Administrator for the County, Mr. Steven E. Mason, declared Handyman Concrete's use of the Premises invalid, without any reference to or determination that there had been a change in circumstances. The Zoning Administrator predicated his decision upon the existence of a "batching plant" being in use on the Premises. As there is no concrete mixing or batching plant on the Premises, the Zoning Administrator curiously appears to have characterized the trucks which loaded and transported the raw materials from the Premises as "plants" for purposes of concrete mixing and batching. The Petitioners appealed this decision of the Zoning Administrator in Appeal Application A 2002-SU-015. On December 4, 2002, the Board of Zoning Appeals ("BZA") affirmed the Zoning Administrator's decision and determined that Handyman Concrete was making use of the Premises for concrete mixing and batching, and not as a building materials yard.

The Petitioners then filed a Petition for a Writ of Certiorari in the Circuit Court for Fairfax County on January 3, 2003, to review the final decision rendered by the BZA. The Fairfax County Circuit Court ("Circuit Court") issued a Writ of Certiorari by order entered on January 8, 2003. On March 18, 2003, William E. Shoup, as the Fairfax County Zoning Administrator, brought a Bill of Complaint for Declaratory Judgment and Injunctive Relief against Petitioner Ira and Virginia Cox, LLP, to enforce the Zoning Administrator's Notice of Violation dated April 29, 2002. The Circuit Court consolidated these actions for trial by order entered April 3, 2003.

On July 22, 2003, the Circuit Court held a hearing on the consolidated cases and both parties presented oral argument. In particular, the Petitioners argued that the zoning ordinance at issue was unconstitutionally vague and that the BZA incorrectly interpreted the term "concrete mixing and batching plant" to include concrete delivery trucks. Although proffered by the parties, the

Circuit Court did not receive any additional evidence on the matter. The Circuit Court, by Final Order entered on August 1, 2003, denied the Petitioners' appeal and ordered the Petitioners to bring the subject property into compliance with the BZA's ruling within 180 days and to abate the zoning violation on the subject property.

The Petitioners timely appealed the Circuit Court decision to the Virginia Supreme Court by filing a Petition for Writ of Certiorari. The Virginia Supreme Court denied the Petition for Writ of Certiorari on February 27, 2004. Petitioners now seek review from the United States Supreme Court for the reasons set forth in this Petition for Writ of Certiorari.

ARGUMENT FOR GRANTING THE WRIT

In the case at bar, the Petitioners submit that the application of County Zoning Ordinance Section 9-501(13)(G) to Handyman Concrete's use of the Premises is void for vagueness and, therefore, in violation of the Due Process clause of the Fourteenth Amendment to the United States Constitution. *U.S. Const. amend.* XIV, § 1 (1868).

The vagueness doctrine is concerned with clarity and protects both free speech and Due Process values. In the case before the Court, the Petitioners are not alleging that their First Amendment rights are impaired, but rather that their Due Process rights as protected by the Fourteenth Amendment are violated. In particular, they submit that Section 9-501(13)(G) of the County Zoning Ordinance is unconstitutionally vague in that it (1) fails to provide a person of ordinary intelligence fair notice of what conduct is prohibited and that, (2) as applied to Handyman Concrete's use of the Premises, it is capable of standardless and arbitrary enforcement by the County Zoning Administrator. As such, this Court must review the Petitioners' vagueness challenge to that Section of the County Zoning Ordinance at issue in light of the

particular facts at hand and not 'on its face.' *Maynard v. Cartwright*, 486 U.S. 356, 361, 108 S. Ct. 1853, 1857, 100 L. Ed.2d 372 (1988); *United States v. Mazurie*, 419 U.S. 544, 550, 95 S. Ct. 710, 42 L. Ed.2d 706 (1975). In determining whether this Section of the County Zoning Ordinance is vague, this Court "must take the [enactment] as though it read precisely as the highest court of the State has interpreted it." *Wainwright v. Stone*, 414 U.S. 21, 22-23, 94 S. Ct. 190, 38 L. Ed.2d 179 (1973) (quoting *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 273, 60 S. Ct. 523, 84 L. Ed. 744 (1973)). In this case, that interpretation is that of the Circuit Court. Moreover, this Court has recently stated that the void for vagueness analyses is to be conducted on a provision-by-provision basis. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389, 1405-06, 152 L. Ed.2d 403 (2002) (analyzing different provisions of the Child Pornography Prevention Act separately and concluding that only certain subsections violated the First Amendment).

Furthermore, the degree of clarity required by the Due Process clause depends upon on the type of statute or regulation and the penalties associated with that regulation. Where criminal penalties exist for violation of a particular statute or regulation, Due Process under the Fourteenth Amendment requires that those statutes and regulations achieve a *higher level of clarity* than those which provide for civil penalties only. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99, 102 S. Ct. 1186, 71 L. Ed.2d 362 (1982) ("The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe."). And "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *City of Chicago v. Morales*, 527 U.S. 41, 57-58, 119 S. Ct. 1849, 144 L. Ed.2d 67 (1999) (internal citations omitted) (holding that the vagueness that voided a statute prohibiting 'loitering' was not uncertainty about

the normal meaning of the word, but what specific conduct was covered by the statute).

Virginia Code section 15.2-2286(5) provides authority for the imposition of criminal sanctions for any violation of a zoning ordinance. *Va. Code Ann.* § 15.2-2286(A)(5) (2003 Repl. Vol.). This Section of the Virginia Code states in relevant part that a zoning ordinance may include provisions such that any violation of a zoning ordinance "shall be a misdemeanor punishable by a fine of not less than$10 nor more than $1,000." *Id.* The County Zoning Ordinance, under the state enabling statute cited above, provides for the imposition of criminal violations and penalties upon a violation of the County Zoning Ordinance. *Fairfax County Zoning Ordinance*, Art. 18, Part 9, § 18-902. Thus, because violation of the County Zoning Ordinance can result in the imposition of criminal penalties, the language in the County Zoning Ordinance must meet the higher constitutional standards established by the Supreme Court with respect to clarity.

In this case, Handyman Concrete and Cox LLP had used the Premises as a building materials yard, which is a use permitted by right in the I-5 Zoning District where the Property is located, for more than 20 years. This use was never questioned by the County Zoning Administrator or County Zoning Board until approximately two years ago, when the County Zoning Administrator declared that use illegal. Specifically, the County Zoning Administrator declared that the use of the Premises leased by Handyman Concrete was no longer that of a building materials yard, but rather that of a prohibited concrete mixing or batching plant. Because the operation of a concrete mixing and batching plant required a special exception permit that the Petitioners had not obtained, the Petitioners' use was declared illegal and the Zoning Administrator demanded the abatement of the alleged illegal operation. However, because Section 9-501(13)(G) of the County Zoning Ordinance fails to give a person of ordinary intelligence fair notice of what

conduct constitutes the operation of a concrete mixing or batching plant and leads to standardless and arbitrary enforcement of this section by the County Zoning Administrator, the application of County Zoning Ordinance Section 9-501(13)(G) to Handyman Concrete's use of the Premises should be struck down as unconstitutional under the "void for vagueness" doctrine.

I. A SECTION OF THE COUNTY ZONING ORDINANCE FAILS TO GIVE A PERSON OF ORDINARY INTELLIGENCE FAIR NOTICE OF THE PROHIBITED ACTIVITY.

Based upon the specific facts in the case at bar, Section 9-501(13)(G) of the County Zoning Ordinance fails to give a person of common intelligence fair notice of what activities are prohibited, and therefore, is unconstitutionally vague under the Due Process clause. This is clearly evidenced by the actions by the County Zoning Administrator where, without any material change in the Petitioners' use of the Premises, the County Zoning Administrator declared that the once legal use of the property as a building materials yard now constitutes the illegal operation of a concrete mixing and batching plant.

The Due Process guarantee of the Fourteenth Amendment prohibits state statutes and regulations that are "so vague that men of common intelligence must necessarily guess at [their] meaning and differ as to [their] application." *Smith v. Goguen*, 415 U.S. 566, 572 n.8, 94 S. Ct. 1242, 39 L. Ed.2d 605 (1974) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed.2d 222 (1972). A state statute or regulation is void for vagueness if it is so unclear with regard to what conduct is prohibited that it "may trap the innocent by not providing fair warning. . .." *Grayned*, 408 U.S. at 108. As stated by the this Court in *Grayned v. City of Rockford*,

"[a]n ordinance which is so vague that a 'person of ordinary intelligence' is not given 'a reasonable opportunity to know what is prohibited so he can act accordingly' is considered a denial of due process." *Id.* at 108. Thus, an ordinance is unconstitutionally vague if it fails to provide adequate notice that will enable citizens to conform their behavior to that particular law.

The Circuit Court and the BZA affirmed the County Zoning Administrator's interpretation that Section 9-501(13)(G) of the County Zoning Ordinance, which prohibits the operation of a "concrete mixing or batching plant" without a special exception permit, also prohibits the operation and use of cement mixing trucks as it pertained the Petitioners. On the other hand, the Petitioners reasonably interpreted the phrase "concrete mixing or batching plant" to incorporate some type of on-site stationary and permanent structure devoted to the manufacture of concrete, which would not apply to cement mixing trucks. Whether a truck is a "plant" as the term "concrete mixing or batching plant" is used in the County Zoning Ordinance became the key issue before the Circuit Court.

A "concrete mixing or batching plant" is not defined in the County Zoning Ordinance. Therefore, under well-established principles of ordinance construction, the "words of the ordinance are to be given their plain and natural meaning." *Fritts v. Carolinas Cement Co.*, 262 Va. 401, 405, 551 S.E.2d 336, 338-39 (Va. 2001) (quoting *Donovan v. Board of Zoning Appeals*, 251 Va. 271, 274, 467 S.E.2d 808, 810 (Va. 1996)). The parties do not dispute the meaning of the terms "concrete mixing or batching," but rather the meaning of the word "plant" as it applied to the use of the Premises by Handyman Concrete. According to Webster's Third New International Dictionary of the English Language Unabridged, "plant" as used in this context is defined as "a factory or workhouse for the manufacture of a product." *Webster's Third New Int'l Dictionary* 1731 (1986). In the common vernacular, factories and

workhouses are both permanent, stationary structures dedicated to the manufacturing of a particular product. Furthermore, "factories" is understood to mean a building or set of buildings. A truck, on the other hand, is most commonly understood as a motor vehicle used as a means of transporting goods and materials from one place to another. Thus, under the plain and natural meaning of "plant," a truck cannot logically be considered a "plant" for the purposes of precluding a permitted rightful use of property under the County Zoning Ordinance. Nonetheless, the BZA and the Circuit Court both affirmed the County Zoning Administrator's interpretation that "plant" as used in Section 9-501(13)(G) included those trucks owned and operated by Handyman Concrete and used to transport raw materials including sand, gravel, and cement to various worksites.

Furthermore, the ambiguity in Section 9-501(13)(G) as applied to Handyman Concrete's use of the Premises should be strictly construed against the County. Where ambiguities exist in local ordinance, the courts have traditionally construed them against the locality and in favor of the property owner. This reflects two common law principles: (1) ambiguous language is construed against the drafter of such language, and (2) statutes and ordinances in derogation of common law property rights will be strictly construed in favor of the property owner. *Town of Mount Jackson v. Fawley*, 53 Va. Cir. 49 (Va. Cir. Ct. 2000) (citing *Young v. Town of Vienna*, 203 Va. 265, 123 S.E.2d 388 (Va. 1962)); *see also* E. C. Yokley, *Zoning Law and Practice* (4th ed., The Michie Co. 1989). As applied to Handyman Concrete, the term "plant" is an ambiguous term that is subject to several different meanings. Consequently, the common law principles with respect to ordinance interpretation set forth above undercuts the County Zoning Administrator's rather broad interpretation of the term "plant" to include trucks when referring to the manufacturing of concrete.

Petitioners strenuously contend that they did not have fair notice of the prohibited use of the Premises as a "concrete mixing or batching plant" in light of the vagueness of the term "plant" as eccentrically interpreted by the County Zoning Administrator, the BZA, and the Circuit Court. Given these wildly differing interpretations and the specific facts of the case, Section 9-501(13)(G) of the County Zoning Ordinance as applied to Handyman Concrete's use of the Premises is unconstitutionally vague and denied the Petitioners their Due Process rights to know how to conform their conduct to comply with the applicable zoning law. Whereas the Petitioners reasonably believed that they were complying with that Section of the Zoning Ordinance at issue by operating a building materials yard, the County Zoning Administrator determined that the use of the Premises was that of a concrete mixing or batching plant. Thus, because Section 9-501(13)(G) of the County Zoning Ordinance and the factual circumstances surrounding this particular case fail to provide adequate notice to the Petitioners of their alleged prohibited conduct, the application of that Section to Handyman's use of the Premises must be struck down as vague and, therefore, unconstitutional.

II. A SECTION OF THE COUNTY ZONING ORDINANCE LEADS TO STANDARDLESS AND ARBITRARY ENFORCEMENT BY COUNTY ZONING OFFICIALS.

Considering the condoned use of the Premises as a building materials yard for more than 20 years, the actions of the County Zoning Administrator in declaring the use of the Premises as a "concrete mixing or batching plant" without any change in facilities or use of the Premises, clearly demonstrates the standardless and arbitrary enforcement of the Zoning Ordinance permitted by the unconstitutionally vague character of Section 9-501(13)(G).

In addition to a statute or regulation being void for vagueness where it fails to give persons of ordinary intelligence fair notice of what conduct is prohibited, a statute or regulation may also be void for vagueness where the enactment is so vague that it invites arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed.2d 903 (1983); *see also Hill v. Colorado*, 530 U.S. 703, 732, 120 S. Ct. 2480, 147 L. Ed.2d 597 (2000) (holding that a statute may be impermissibly vague if it "authorizes or even encourages arbitrary and discriminatory enforcement"); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 170, 92 S. Ct. 839, 31 L. Ed.2d 110 (1972) (invalidating an ordinance on vagueness grounds partially because "there are no standards governing the exercise of the discretion granted by the ordinance"). In *Kolender v. Lawson*, this Court recognized that "the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.'" 461 U.S. at 357 (quoting *Smith v. Goguen*, 415 U.S. 566 (1974)). Thus, an ordinance is void for vagueness if it is so standardless that it enables "arbitrary and discriminatory enforcement." *Grayned*, 408 U.S. at 108.

County Zoning Officials prior to April 29, 2002, along with the Petitioners, reasonably interpreted the use of the Premises as a building materials yard, which is a by-right permitted use under Section 5-502 of the County Zoning Ordinance. As part of Handyman Concrete's due diligence prior to purchasing the business from Mr. Cox, Mr. Tracy disclosed to the County Zoning Officials that the use he intended to continue on the Premises was consistent with the use that had been made on the Premises for nearly two decades by Handyman Concrete, Inc. This use was also consistent with the prior usage of the Premises that the County Zoning Administrator had determined was lawful for the issuance of NRUPs to previous occupants, thereby authorizing them to conduct

the use as a building materials yard. Thus, the County Zoning Administration had consistently construed the use of the Premises by Handyman Concrete, Inc. as a legal and valid use in an I-5 Zoning District for approximately 20 years. Nonetheless, approximately one year after Mr. Tracy acquired Handyman Concrete, the County Zoning Administrator declared Handyman Concrete's use of the Premises invalid, without any reference to or determination that there had been a change in circumstances. The County Zoning Administrator abruptly and without explanation changed its consistent construction of the County Zoning Ordinance as it applied to Handyman Concrete's use of the Premises, which had permitted the use of the Premises as a buildings material yard.

In the absence of any clarity as to what constitutes a "concrete mixing or batching plant" provided by the County Zoning Ordinance, the County Zoning Administrator is left with the complete discretion to enforce Section 9-501(13)(G) in an arbitrary manner. As in *Kolender* where the statute contained no standard for determining what conduct satisfied the requirement to provide "credible and reliable" information and vested complete discretion in the police enforcing the statute, Sections 9-501(13)(G) of the County Zoning Ordinance leads to standardless and arbitrary enforcement by the County Zoning Administrator because of the vagueness created by his peculiar interpretation of the term "plant." The actions by the County Zoning Administrator in condoning the use of the Premises for an extended period of time as a rightful use and then suddenly prohibiting the same use of the Premises as an illegal use demonstrates that the Due Process rights of the Petitioners were violated under a vagueness analysis. Therefore, this Court should strike down the application of Section 9-501(13)(G) to Handyman Concrete's use of the Premises as unconstitutionally vague.

CONCLUSION

For the reasons stated herein, the Petitioners respectfully request that the petition for a writ of certiorari should be granted.

Respectfully submitted,

COMMONWEALTH CONSTRUCTION MANAGEMENT, INC., T/A HANDYMAN CONCRETE and IRA AND VIRGINIA COX, LLP
By Counsel

Dexter S. Odin, Esq.
Elizabeth A. Keith, Esq.
ODIN, FELDMAN & PITTLEMAN, PC
9302 Lee Highway, Suite 1100
Fairfax, VA 22031
Counsel for Petitioner Commonwealth Construction Management, Inc., t/a Handyman Concrete

W. McCauley Arnold, Esq.
John W. Farrell, Esq.
MCCANDLISH & LILLARD, PC
13350 Random Hills Road, Suite 500
Fairfax, VA 22030
Counsel for Petitioner Ira and Virginia Cox, LLP

Date: May 27, 2004

No._____

In The Supreme Court of the United States

COMMONWEALTH CONSTRUCTION MANAGEMENT, INC. T/A HANDYMAN CONCRETE AND IRA AND VIRGINIA COX, LLP,

Petitioners,

v.

BOARD OF ZONING APPEALS OF FAIRFAX COUNTY, VIRGINIA; BOARD OF SUPERVISORS FOR THE COUNTY OF FAIRFAX, VIRGINIA; COUNTY OF FAIRFAX, VIRGINIA; AND THE ZONING ADMINISTRATOR OF FAIRFAX COUNTY,

Respondents.

On Petition for a Writ of Certiorari
to the Circuit Court of Fairfax County, Virginia

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Dexter S. Odin, Esq.
Elizabeth A. Keith, Esq.
Odin, Feldman & Pittleman, P.C.
9302 Lee Highway, Suite 1100
Fairfax, Virginia 22031
(703) 218-2122
Counsel for Petitioner
Commonwealth Construction
Management, Inc.
t/a Handyman Concrete

W. McCauley Arnold, Esq.
John W. Farrell, Esq.
McCandlish & Lillard, P.C.
13350 Random Hills Road
Suite 500
Fairfax, Virginia 22030
(703) 934-1182
Counsel for Petitioner
Ira and Virginia Cox, LLP

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Commonwealth Construction Mgt, Inc.) t/a Handyman Concrete et al.,	)	
Complainant,	)	
Vs.	)	) Law No. 210690) Chancery No.) 183107
Board of Zoning Appeals,	)	
Respondent.	)	

ORDER

This case came to be heard on the 22nd day of July, 2003, on the Complainant's motion to appeal the decision of the BZA, and the Zoning Administrator's Bill of Complaint for enforcement of violations of the Zoning Ordinance.

Upon the matters presented to the Court at the Hearing it is,

ADJUDGED, ORDERED, and DECREED as follows: The Complainants' Appeal of the decision of the Board of Zoning Appeals of Fairfax County is Denied; and, the Complainants/Petitioners are allowed 180 days to bring the subject property into compliance with the ruling of the Board of Zoning Appeals and abate the zoning violation on the subject property. Each of the objections made by the Counsel for the Defendant and the Petitioner are accepted as objections made by the other. The exception and objections of the Petitioner and Defendant for the reasons stated in the record is noted as

APPENDIX A

to this Order and the Court's decision.

Entered, this 1st day of August, 2003.

/s/
Circuit Court Judge

Seen and Objected as to the
amount of time for Compliance

/s/
Counsel for the Respondent/
Complainant
BZA and Zoning Administrator

/s/
/s/
Counsel for the
Defendant/Petitioner

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 27th *day of* February, 2004.

Commonwealth Construction Management, Inc., et. al., Appellants,

against Record No. 032534
Circuit Court Nos. L210690
and CH183107

Board of Zoning Appeals of Fairfax County, et al., Appellees.

From the Circuit Court of Fairfax County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

Patricia H. Krueger, Clerk

By:

/s/
Deputy Clerk

APPENDIX B